



ASIAN DOMAIN NAME DISPUTE RESOLUTION CENTRE (BEIJING OFFICE)

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Decision Submission

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| Decision ID | DE-0300017 |
| Case ID | CN-0200016 |
| Disputed Domain Name | www.chinadaily.com |
| Case Administrator | anitaw |
| Submitted By | Julian D M Lew |
| Participated Panelist | Julian D M Lew |
| Date of Decision | 14-02-2003 |

The Parties Information

| | |
|-------------------|-------------|
| Claimant | China Daily |
| Respondent | Yang Rui |

Procedural History

On 19 December 2002 the Beijing Office of the Asian Domain Name Dispute Resolution Centre (“ADNDRC”) received the Complaint form from the Claimant. Beijing Office of ADNDRC confirmed receipt of the claim on 20 December 2002 and the registration information was confirmed by the Registrar on 31 December 2002.

On 3 January 2003, Beijing Office of ADNDRC notified the Respondent of the commencement of proceedings, and forwarded the claim to the Respondent, advising the Respondent that the deadline for receipt of the Response was 23 January 2003. The Respondent filed the Response on 23 January 2003.

The Parties were notified of the proposed appointment of Julian D M Lew as the sole panelist to decide the dispute on 24 January 2003, and his appointment was confirmed by Beijing Office of ADNDRC on 31 January 2003.

Factual Background

For Claimant

China Daily is the first and only English language newspaper in China. It was founded in 1981 and has since diversified into a group of nine publications with circulation in more than 100 countries. It has a website at “www.chinadaily.com.cn” . Its stories are frequently quoted by the international media, and the organization has been commended by international public figures.

Since 1983, China Daily’ s North American Distribution Group has used the name “China Daily” throughout the United States and Canada.

A search of the Verisign domain name registry which the Claimant exhibited to the Complaint shows that “chinadaily.com” was first registered as a domain name on 4 December 1995, and that it is currently owned by the Respondent.

On 15 August 2000, the United States Patent and Trademark Office (“USPTO”) granted China Daily Distribution Corp. a trademark for the “China Daily” mark for “General Circulation Newspaper Pertaining to China” . It was registered with the date of first use as June 1983, the year in which China Daily Distribution Corp. was incorporated. The incorporation certificate for China Daily Distribution Corp. and the registration certificate for the mark “China Daily” were exhibited to the Complaint.

In July 2002, the Claimant filed a Complaint (“the First Complaint”) regarding “chinadaily.com” with the National

Arbitration Forum. The National Arbitration Forum is one of the Internet Corporation for Assigned Names and Numbers' ("ICANN") five Approved Providers for Uniform Domain Name Dispute Resolution Policy. ADNDRC is also one of these five ICANN accredited institutions. Mr. Clive Elliott acted as sole panelist in this dispute and issued an award in favor of the Respondent on 25 September 2002. This decision has been available to the Panel for examination in this dispute.

For Respondent

The Respondent registered the domain name "chinadaily.com" with Network Solutions on 9 March 1998. The Response does not contain assertions of factual background pertaining to the Complaint. However, the first Complaint, Response to the first Complaint and Decision in the first Complaint are exhibited to and part of the response.

Parties' Contentions

Claimant

The Claimant asserts that China Daily is the only national level English language newspaper in China with circulation in more than 100 countries. It has had a distribution centre in the United States since 1983, and over the last twenty years has become a very prestigious newspaper in China, to which many famous people gave their endorsements on its founding anniversaries. The Claimant exhibited several examples of such endorsements and international circulation to the Complaint.

The Claimant asserts that China Daily' s extensive use of the "China Daily" mark in the international arena for more than twenty years is sufficient reason to establish common law rights in that mark when the Respondent registered "chinadaily.com" as a domain name in 1998.

The Claimant refers to the Respondent' s assertion in the Response to the First Complaint that he had a right to "chinadaily.com" as a domain name because he is of ethnic Chinese origin, is living in the United States, and had intended to make daily postings to this website. The Claimant asserts that it is beyond reasonable doubt that the Respondent knew about the China Daily Newspaper when he registered "chinadaily.com" as a domain name in 1998. The Claimant considers the assertion that he chose "china" and "daily" because he is Chinese and intended to use it every day to be "far-fetched" . It refers to a definition of "daily" in the Oxford Advanced Learner' s English-Chinese Dictionary, an extract from which is exhibited to the Complaint. This dictionary defines "daily" in this context as "a newspaper published every weekday" . The Claimant asserts that they have obtained a password for the Respondent' s website at "www.chinadaily.com" and by doing so have found that the Respondent began making postings to this website "around the turn of this year" i.e. 2002. The Claimant considers that although the frequency of the Respondent' s postings has increased, they still fall short of fulfilling the definition of "every weekday" .

The Claimant asserts that even if the Respondent registered "chinadaily.com" as a domain name in 1998 without the intention of selling it to China Daily Distribution Corp., the fact that the Respondent has gone to "such lengths" to claim his legitimate right to the combination of the words "china" and "daily" as a domain name is demonstrative of the bad faith of the Respondent.

The Claimant exhibited to the Complaint a copy of a search of the Verisign domain name registry, which shows that a record for "chinadaily.com" as a domain name was first registered on 4 December 1995. The Claimant states that this search result is not publicly available. The Claimant asserts that at this time the Internet had not taken off as a commercial tool in China, and that a lot of Chinese trademarks were registered as domain names by foreign speculators. The Claimant explains that it registered "chinadaily.net" in 1996 and "chinadaily.com.cn" in 1997, and therefore rejects the assertion by the Respondent in the Response to the First Complaint that it registered "www.chinadaily.com.cn" instead of "www.chinadaily.com" as its website out of choice.

The Claimant asserts that it has been victim of domain name parking for many years

Respondent

The Respondent refers to the proceedings and the Decision in his favor in the First Complaint, finding that the Respondent had rights and legitimate interests in using "chinadaily.com" as a domain name, and that the Complainant had failed to prove the Respondent' s bad faith. The Claimant exhibited the First Complaint, Response to the First Complaint and Decision in the First Complaint to the Response. The Respondent denies the Complaint in its entirety. The Respondent asserts that the arguments raised by the Claimant in the Complaint are contrary to the arguments raised by the Claimant in the First Complaint, as those had already been addressed by the Respondent in the Response to the First Complaint. The Respondent asserts that this shows that the issues pleaded by the Claimant are untrue.

The Respondent asserts that the Claimant has abused the Uniform Domain Name Dispute Resolution Policy (“the Policy”) by subjecting the Respondent to multiple mandatory administrative proceedings conducted under the Policy for the same domain names between the same parties. The Respondent asserts that this is contrary to Section 4 of the Policy, which refers to “a mandatory administrative proceeding” . The Respondent asserts that the Claimant violates the legal principle of res judicata by attempting to bring the same subject matter for adjudication on two occasions. The Respondent also asserts that the Complaint violates the basic principle of arbitration that an arbitration award is final by initiating new arbitration proceedings under the same set of rules and between the same parties as the First Complaint.

The Respondent asserts that allowing the Claimant to proceed with the Complaint would effectively give ADNDRC de facto appellate power over NAF, and would be against the purpose of the Policy, which is to provide a simple, expedited and affordable mechanism to resolve domain name disputes.

The Respondent asserts that the affiliation of Mr. Joseph Zhu, the authorized representative for the Claimant, with China Internet Network Information (“CNNIC”) means that there is undue influence over the Complaint, because ADNDRC is a joint venture between CNNIC and the China International Economic and Trade Arbitration Commission (“CIETAC”). The Respondent asserts that Mr. Joseph Zhu should be barred from representing a case in front of ADNDRC because he worked for HiChina, an ICANN accredited registrar from December 1998 to December 2002.

The Respondent asserts that this dispute has been handled unfairly by the ADNDRC case manager. The Respondent states that he has sent several emails to the case manager, challenging the Claimant’ s rights to bring the Complaint. These emails are exhibited to the Response. The Respondent claims that he did not receive a reply to some of these emails, and that the case manager informed him that the Policy does not contain any, “... prohibitive provision that a domain name dispute service provider should not accept a case that was previously awarded by a different domain name dispute service provider” . The Respondent did not consider this to be a satisfactory response. The Respondent also asserts that the case manager has been unfair in insisting that he file the Response within the 20 day period originally set by the case manager, despite him not having received a copy of the exhibits to the First Complaint. The case manager also failed to make a timely request that the Claimant’ s representative show proof of his authorization by the China Daily News Group.

The Respondent states that he is not attempting to deny the Claimant’ s rights to bring a legal action against him in a court with proper jurisdiction, as provided by section 4 of the Policy. He asserts, however, that allowing the Complaint to proceed will set a precedent for parties in other domain name disputes to abuse the Policy.

Findings

Identical / Confusingly Similar

The Panel accepts the Claimant’ s assertion that China Daily is the only national level English language newspaper in China, with circulation in over 100 countries and that it has had a distribution centre in the United States since 1983. This is borne out by the exhibits to the Complaint showing the Certificate of Incorporation of China Daily Distribution Corp. dated 23 March 1983, and by the various examples of China Daily’ s internationally acclaimed status.

The Panel accepts the Claimant’ s assertion that China Daily Distribution Corp. has used “China Daily” as a mark since its incorporation in 1983, and that recognition of this mark is widespread amongst its readership.

The recognition of the Claimant’ s rights in “china daily” as a mark is shown from the USPTO registration of a trademark in favor of the Claimant dated 15 August 2000, and supported by the trademark certificate exhibited to the Complaint.

The Panel has considered the assertions made by the Respondent in the Response to the First Complaint, namely that he is of ethnic Chinese origin, and that the combination of “china” with the word “daily” is not distinctive. The Claimant’ s representations as to the meaning of the word “daily” in this context, and to the intended frequency of the Respondent’ s postings to the website are not of material importance in deciding whether the domain name is identical or confusingly similar to the Claimant’ s business.

There is considerable merit in the Claimant’ s assertion that “chinadaily.com” is confusingly similar, if not identical, to the mark “china daily” registered by the Claimant with USPTO in 2000. None of the assertions put forward by the Respondent detract from this.

The Panel consequently finds that the domain name “chinadaily.com” registered by the Respondent is confusingly similar to the Claimant’ s trademark “china daily” .

Rights and Legitimate Interests

Paragraph 4(c) of the Policy sets out three grounds, any of which, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate [the Respondent’ s] rights or legitimate interests to the domain name for the purposes of determining the dispute.

Paragraph 4(c)(i) states that this ground will be made out if, “before any notice to [the Respondent] of the dispute, [the Respondent’ s] use of, or demonstrable preparations to use, the domain name … [were] in connection with a bona fide offering of goods or services.”

The Respondent claimed in the Response to the First Complaint that he was using the website for the provision of bona fide services prior to receiving any notice of the dispute. The “snapshot” from the website that the Respondent exhibited to the Response to the First Complaint is taken by the Panel as evidence that the Respondent was using the website prior to receiving notice of the dispute. Although the Panel has not itself inspected the contents of the website, the Claimant has not provided any new evidence that the Respondent is using the domain name in connection with anything other than a bona fide offering of goods or services.

Paragraph 4(c)(iii) states that this ground will be made out if, “[the Respondent] is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark … at issue.”

The Panel has not been given the opportunity to look at the website maintained by the Respondent at “www.chindaily.com” as it is a password protected site which restricts access to those individuals who have been provided with the password. However, the Panel accepts the Respondent’ s claim that no individual was charged for provision of the appropriate password, and that the website is operated at no cost to those accessing it. The Panel also accepts the Respondent’ s assertion that the name of the website was chosen to reflect the Respondent’ s ethnic origins, and that the choice of “china” and “daily” as a combination of words was legitimate for the Respondent’ s purpose of providing a website containing stock market commentary and updated analysis. Although the Panel has not itself inspected the contents of the website, there is no suggestion in the evidence and documents put before the Panel that the Respondent is using the domain name for anything other than legitimate or fair use, or that the Respondent has any intention of diverting customers or tarnishing the trademark.

The Panel considers that the Respondent has fulfilled grounds 4(c)(i) and 4(c)(iii). The Panel consequently finds that the Claimant has failed to prove that the Respondent has no rights or legitimate interests in respect of the domain name.

Bad Faith

There is no dispute between the parties that the domain name has been registered by the Respondent.

Paragraph 4(b) of the Policy sets out certain circumstances which, in particular and without limitation, shall be evidence of bad faith if found by the Panel. Having examined all the statements and documents presented to it, the Panel has not found any circumstances, mentioned in paragraph 4(b) or otherwise, which lead to the conclusion that the Respondent is using the website in bad faith.

The First Complaint contained reference to the allegation that the Respondent made representations to the Claimant that he might be prepared to sell the domain name. The Respondent contended in the Response to the First Complaint that this representation was made as a result of an unsolicited approach from an individual whom he did not realise was an employee of the Claimant. The Panel is not presented with sufficient evidence to decide the truth of these allegations, and accordingly does not find that the Respondent’ s alleged representation to sell the domain name amounts to using the domain name in bad faith.

The Panel consequently finds that the Claimant has failed to prove that the domain name has been registered and is being used in bad faith.

Status

www.chinadaily.com

Complaint Rejected

Decision

Paragraph 15 (a) of the Rules for Uniform Domain Name Dispute Resolution Policy (“the Rules”) states that, “A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the

Policy, these Rules and any rules and principles of law that it deems applicable.”

None of the Respondent’ s assertions detract from the fact that the Panel has not been made aware of any provision or stipulation of the Policy, the Rules or the Supplemental Rules which prevent the Claimant from bringing the Complaint on the basis of the statements and documents which have been submitted. The Panel has therefore decided the dispute in accordance with the statements and documents submitted to it, the Policy, the Rules and the Supplemental Rules.

Paragraph 4 (a) of the Policy states that in the administrative proceeding, the claimant must prove that each of the following three elements is present,

“(i) [the Respondent’ s] domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and

(ii) [the Respondent] has no rights or legitimate interests in respect of the domain name; and

(iii)[the Respondent’ s] domain name has been registered and is being used in bad faith.”

The Claimant has failed to show that the Respondent has no rights or legitimate interests in respect of the domain name. The Claimant has also failed to show that the Respondent’ s domain name has been registered and is being used in bad faith.

In view of the reasons set out above, the Complaint is rejected.

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